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POWERS OF REGULATION VESTED IN CONGRESS.

THE past few years have made acute the conflict respecting the relative legislative powers of state and nation. This, no doubt, is largely due to the fact that only recently has any determined effort been made to secure the exercise by Congress of its full powers over commerce and the instrumentalities thereof; and this oversight or lack of initiative on the part of our legislators has led to legal confusion which will probably continue until the opportunity is offered for having the full constitutional powers of the National Congress clearly defined by the highest judicial authority.

The commercial growth and expansion of the United States is unprecedented in the history of nations. In the course of this wonderful commercial development, many legal problems have arisen which urgently call for solution. With this expansion have come new rights which loudly call for protection, and with it, too, abuses which no less loudly demand a remedy. Whenever unusual situations present themselves, it is at once thought that the existing laws are inadequate to meet the changed conditions, and new legislation is forthwith demanded.

Such demand requires due thought and thorough consideration of the relations of citizens to each other, the relations of the people to property, and the relations of government to both. It is contrary to the genius of our institutions, and the best interests of the people, that the government should control the ownership and management of the business of the country; yet it is the undoubted right, and should be the duty, of the government, to supervise

wisely the commercial relations of its citizens. To reach a sane solution of this complex question involves a consideration of federal laws and their relation to state laws, and brings up for discussion the question of the powers of regulation vested in the national Congress. By powers of regulation, I have in mind the ability of Congress to deal with all subjects of national concern, whether such powers be expressly granted by, or fairly implied within, the Constitution.

In the solution of any question involving the powers conferred by the Constitution resort must be had to interpretation of that instrument. The Constitution does not expressly delegate to Congress "regulatory" powers as that term is now commonly accepted. Such authority must be found in "construction," and "construction" always engenders opposition — in fact no radical legislation of national import has ever been enacted without encountering the challenge of unconstitutionality. New legislation, and new application of existing legislation, are therefore certain to be the subject of searching judicial inquiry.

The powers of regulation which are here treated are not limited to any specific form, but have application to various situations, to which changed conditions have given rise. It happens that the changes have been largely commercial and industrial, and therefore the questions necessarily have reference to these subjects.

I. Articles of Confederation and the Constitution.

To determine the application of law, its genesis is necessarily the first point in logical order.

Prior to the Constitution and after the United States had declared themselves free and independent, there was entered into what was called the "Articles of Confederation and Perpetual Union between the thirteen original Colonies."

The purpose of this Confederation was practically limited to a friendly arrangement between the *states*, without yielding any of the sovereignty, independence, powers, or substantial rights of any state. There was no merger of state interests into the Confederated United States of America, and there was no provision accepting the sovereignty of the United States of America over the citizens or

the powers of the respective states. In other words, it was merely intended by these several states to establish a political offensive and defensive compact, without yielding any of their independence or sovereignty.

It was soon found that this Confederation did not serve to form a strong central government. Instead, the conflicts and competition arising between the people of the different states invited a spirit of unfriendliness and disunion. To assure a government to advance and protect the people of all the States effectively, a new fundamental contract, namely, the Constitution of the United States, was adopted. That contract, as will be observed, was not a *compact* of the *various states* but of the *people of the United States*, as will be seen from the Preamble, which reads:

"We, the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America."

A reading of the Articles of Confederation and the Preamble of the Constitution shows clearly the wide difference in the purpose of the two instruments. The Confederation was a "loose league of friendship"; the Union created by the Constitution is an indissoluble entity under that fundamental contract which is self-contained and self-executing.

II. The General Powers of Congress.

Though perhaps unnecessary, it is well to call attention to the provisions of the Constitution which established once and for all time the relationship of the states to the Union, and determined forever where lay the supremacy of power. Paragraph 2 of Article VI, the clause of authority, reads:

"This Constitution and the Laws of the United States which shall be made in Pursuance thereof, and all Treaties made, or which shall be made under the Authority of the United States, shall be the supreme Law of the land; and the Judges in every State shall be bound thereby; any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

Whenever Congress acts within its powers under the Constitution, that act has the force of law and binds the people and every state of the United States.

Ever since the Constitution was adopted it has been insisted that it should have strict construction. Chief Justice Marshall, however, in the case of Gibbons *v.* Ogden,[1] involving the power of Congress to regulate commerce, commenting on this contention that the Constitution should be strictly construed, said:

"This instrument contains an enumeration of powers expressly granted by the people to their government. It has been said that these powers ought to be construed strictly. But why ought they to be so construed? Is there one sentence in the Constitution which gives countenance to this rule? In the last of the enumerated powers, that which grants, expressly, the means of carrying all others into execution, Congress is authorized 'to make all laws which shall be necessary and proper' for the purpose. But this limitation on the means which may be used is not extended to the powers which are conferred; nor is there one sentence in the Constitution which has been pointed out by the gentlemen of the bar, or which we have been able to discern, that prescribes this rule. We do not, therefore, think ourselves justified in adopting it."

The tendency, characteristic of a non-progressive spirit, is to solicit an interpretation of the Constitution that will exclude from its protection and application any subject that may be new, instead of seeking a construction which will enable Congress to deal with it as fairly within the spirit and the scope of the Constitution. No charter drawn for the guidance of a great nation, the development of which it was utterly impossible to discern in advance, could undertake to provide in express terms for every future contingency. It must necessarily have been framed in general terms and depend upon interpretation for its application to changing conditions.

Mr. Justice Story in the case of Martin *v.* Hunter's Lessee[2] uses language prophetic of the future, and indicative of the power of the people under the Constitution to meet and deal with the important and all-absorbing questions of the day. He says:

"The Constitution unavoidably deals in general language. It does not suit the purposes of the people, in framing this great charter of our liberties, to provide for minute specification of its powers, or to declare

[1] 9 Wheat. (U. S.) 1.

[2] 1 Wheat. (U. S.) 304.

the means by which these powers should be carried into execution. It was foreseen that this would be a perilous and difficult, if not an impracticable, task. The instrument was not intended to provide merely for the exigencies of a few years, but was to endure through a long lapse of ages the events of which were locked up in the inscrutable purposes of Providence. It could not be foreseen what new changes and modifications of power might be indispensable to effectuate the general objects of the charter; and restrictions and specifications which, at the present, might seem salutary, might, in the end, prove the overthrow of the system itself. Hence its powers are expressed in general terms, leaving to the legislature, from time to time, to adopt its own means to effectuate legitimate objects, and to mold and model the exercise of its powers as its own wisdom and the public interests should require."

From time to time Congress has undertaken to enact legislation deemed necessary for the advancement and development of the nation. Such enactments have not been limited to subjects specifically delegated by the Constitution to Congress, but included those necessary to meet new conditions. For instance, the Constitution did not in terms authorize Congress to legislate upon matters of banks or banking, and yet Congress did authorize the organization of the United States Bank; and in McCulloch *v.* Maryland[3] Chief Justice Marshall, in upholding the constitutionality of this legislation, said:

"Although, among the enumerated powers of government, we do not find the word 'bank' or 'incorporation,' we find the great powers to lay and collect taxes; to borrow money; to regulate commerce; to declare and conduct a war; and to raise and support armies and navies. The sword and the purse, all the external relations, and no inconsiderable portion of the industry of the nation, are entrusted to its government."

In further answer to the argument against the power of Congress to create a corporation, that great jurist, continuing, said:

"On what foundation does this argument rest? On this alone: The power of creating a corporation is one appertaining to the sovereignty, and is not expressly conferred on Congress. This is true. But all legislative powers appertain to sovereignty. The original power of giving the law on any subject whatever is a sovereign power; and if the government of the Union is restrained from creating a corporation, as a means for per-

[3] 4 Wheat. (U. S.) 316.

forming its functions, on the single reason that the creation of a corporation is an act of sovereignty; if the sufficiency of this reason be acknowledged, there would be some difficulty in sustaining the authority of Congress to pass other laws for the accomplishment of the same objects.

"The government which has a right to do an act, and has imposed on it the duty of performing that act, must, according to the dictates of reason, be allowed to select the means; and those who contend that it may not select any appropriate means, that one particular mode of effecting the object is excepted, take upon themselves the burden of establishing that exception."

And in conclusion:

"Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional."

Since that decision, the National Banking Act was adopted by Congress, and under it a system of banking has been established which has withstood every trial and all the vicissitudes of time and circumstance. Congress, too, has enacted regulatory legislation with respect to pensions, crimes and misdemeanors, pure food, lighthouse and life-saving service, and numberless other matters, without in any case finding any specific provision therefor in the Constitution.

Congress has dealt with these conditions, in the absence of such specific grant of power because the public interest required it, and because fairly and reasonably such enactments were within the scope and spirit of the Constitution.

III. The United States a Commercial Nation.

The United States is essentially a commercial nation. The framers of the Constitution seem to have looked far into the future. They evidently recognized that the great opportunities for national development lay in commerce. The foundation therefor was firmly established in the charter. In the broadest possible language, the Constitution delegated to Congress the power to deal with the subject, in the following words:

"The Congress shall have power . . . to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

The commercial growth of the nation depended upon the development of the instrumentalities of commerce. The country and the people proved equal to the situation. Thousands of miles of railroads were constructed, making it possible to populate and develop all parts of the United States. Telegraph companies and telephone companies brought the people in almost instantaneous communication from ocean to ocean. Interurban railroads contributed their share to the settlement of the country, as did steamship and other water transporation companies. The United States mails, as well as the express companies, made it possible for the people in distant States to transact business and exchange communications with freedom and with convenience. These different means of transportation, intercourse and communication — each a distinct instrumentality of commerce — together constitute the great arteries of business through which the nation's future greatness under the guidance of Congress was assured under the Constitution.

The courts when called upon to give construction to the commerce clause of the Constitution have from the beginning not only recognized its vital importance, but have constantly given construction thereto which has for all time settled the right of Congress, and of Congress alone, to deal with the subject of interstate commerce.

IV. The Commerce Clause.

The leading case on the commerce clause of the Constitution is Gibbons *v.* Ogden,[4] wherein the great cardinal principles of this branch of constitutional law are forcibly expressed by Chief Justice Marshall. In answer to the inquiry, "What is this power?" he said:

"It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and

[4] 9 Wheat. (U. S.) 1.

acknowledges no limitations, other than are prescribed in the Constitution. These are expressed in plain terms, and do not affect the questions which arise in this case, or which have been discussed at the bar. If, as has always been understood, the sovereignty of Congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations, and among the several states, is vested in Congress as absolutely as it would be in a single government, having in its Constitution the same restrictions on the exercise of the power as are found in the Constitution of the United States."

Mr. Justice Bradley (of the Supreme Court, sitting as a circuit judge), in the case of Stockton *v.* Baltimore & N. Y. R. Co.,[5] in discussing the power to regulate commerce free from interference by the states, says:

"Still it is contended that, although Congress may have power to construct roads and other means of communication between the states, yet this can only be done with the concurrence and consent of the states in which the structures are made. If this is so, then the power of regulation in Congress is not supreme; it depends on the will of the states. We do not concur in this view. We think that the power of Congress is supreme over the whole subject, unimpeded and unembarrassed by state lines or state laws; that, in this matter, the country is one, and the work to be accomplished is national; and that state interests, state jealousies, and state prejudices do not require to be consulted. In matters of foreign and interstate commerce there are no states."

In the case of *In re* Debs[6] — very instructive upon the powers of the federal government under the Constitution — the Supreme Court, speaking through Mr. Justice Brewer, said:

"What are the relations of the general government to interstate commerce and the transportation of the mails? They are those of direct supervision, control, and management. While, under the dual system which prevails with us, the powers of government are distributed between the state and the nation, and while the latter is properly styled a government of enumerated powers, yet within the limits of such enumeration it has all the attributes of sovereignty, and, in the exercise of those enumerated powers, acts directly upon the citizen, and not through the intermediate agency of the state. . . .

"Constitutional provisions do not change, but their operation extends to new matters, as the modes of business and the habits of life of

[5] 32 Fed. 9.

[6] 158 U. S. 564.

the people vary with each succeeding generation. The law of the common carrier is the same to-day as when transportation on land was by coach and wagon, and on water by canal boat and sailing vessel; yet in its actual operation it touches and regulates transportation by modes then unknown — the railroad train and the steamship. Just so is it with the grant to the national government of power over interstate commerce. The Constitution has not changed. The power is the same. But it operates to-day upon modes of interstate commerce unknown to the fathers, and it will operate with equal force upon any new modes of such commerce which the future may develop."

Comparatively recent is Champion *v.* Ames [7] (the Lottery case), where the Supreme Court, speaking through Mr. Justice Harlan, in referring to former expressions of the court on this subject, says:

"They show that commerce among the states embraces navigation, intercourse, communication, traffic, the transit of persons and the transmission of messages by telegraph. They also show that the power to regulate commmerce among the several states is vested in Congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the Constitution of the United States; that such power is plenary, complete in itself, and may be exerted by Congress to its utmost extent, subject *only* to such limitations as the Constitution imposes upon the exercise of the powers granted by it; and that in determining the character of the regulations to be adopted, Congress has a large discretion which is not to be controlled by the courts, simply because, in their opinion, such regulations may not be the best or most effective that could be employed."

It will be observed that the power of Congress to deal with interstate commerce is exclusive and is prohibitory of any exercise of legislative action or control by the states. The rule with reference to legislative control over interstate commerce is not limited to corporations. It is just as applicable to and enforceable against individuals, firms, partnerships, and other forms of business associations, which undertake to engage in interstate commerce.

The relative powers of the federal government and the states over the commerce of the country have been clearly defined by the Supreme Court, and this is nowhere better illustrated than in its decisions with reference to foreign corporations.

[7] 188 U. S. 321.

If from the expressions of the Supreme Court in the very early case of Bank of Augusta *v.* Earle,[8] or the subsequent case of Paul *v.* Virginia,[9] or in the recent case of Security Mutual Life Insurance Co. *v.* Prewitt,[10] any doubt has existed as to the unqualified supremacy of the federal laws over the laws of the several states with reference to matters committed to Congress by the federal Constitution, such doubt has been completely dispelled by the decisions of the Supreme Court of the United States handed down at the last term of court in the cases of Western Union Telegraph Co. *v.* Kansas, decided January 17, 1910; Pullman Co. *v.* State of Kansas, decided January 31, 1910; Southern Railway Co. *v.* Greene, decided February 21, 1910, and Herndon *v.* Chicago, Rock Island, & Pacific Ry. Co., decided May 31, 1910.

The broad doctrine announced by the Supreme Court in Bank of Augusta *v.* Earle, *supra*, speaking of the rights of a foreign corporation, "It must dwell in the place of its creation and cannot migrate to another sovereignty," was thus elaborated and emphasized in Paul *v.* Virginia, *supra:*

"The recognition of its existence even by other states, and the enforcement of its contracts made therein, depend purely upon the comity of those states — a comity which is never extended where the existence of the corporation or the exercise of its powers are prejudicial to their interests or repugnant to their policy. Having no absolute right of recognition in other states, but depending for such recognition and the enforcement of its contracts upon their assent, it follows, as a matter of course, that such assent may be granted upon such terms and conditions as those states may think proper to impose. They may exclude the foreign corporation entirely; they may restrict its business to particular localities, or they may exact such security for the performance of its contracts with their citizens as in their judgment will best promote the public interest. The whole matter rests in their discretion."

The opinion in this case was by Mr. Justice Field.

In the later case of Pensacola Telegraph Co. *v.* Western Union Tel. Co.[11] the court very materially modified the opinion theretofore expressed in Paul *v.* Virginia, basing its modification or change of opinion upon the ground that the question of interstate commerce was not there involved, saying:

[8] 13 Pet. (U. S.) 519.
[9] 8 Wall. (U. S.) 116.
[10] 202 U. S. 246.
[11] 96 U. S. 1.

"We are aware that, in Paul *v.* Virginia, 8 Wall. 168 (75 U. S., XIX, 357), this court decided that a state might exclude a corporation of another state from its jurisdiction, and that corporations are not within the clause of the Constitution which declares that 'The citizens of each state shall be entitled to all privileges and immunities of citizens of the several states.' Art. IV, sec. 2. That was not, however, the case of a corporation engaged in interstate commerce; and enough was said by the court to show that, if it had been, very different questions would have been presented. The language of the opinion is, p. 182 (361): 'It is undoubtedly true, as stated by counsel, that the power conferred upon Congress to regulate commerce includes as well commerce carried on by corporations as commerce carried on by individuals. . . . This state of facts forbids the supposition that it was intended in the grant of power to Congress to exclude from its control the commerce of corporations. The language of the grant makes no reference to the instrumentalities by which commerce may be carried on; it is general, and includes alike commerce by individuals, partnerships, associations and corporations. . . . The defect of the argument lies in the character of their [insurance companies'] business. Issuing a policy of insurance is not a transaction of commerce. . . . Such contracts [policies of insurance] are not interstate transactions, though the parties are domiciled in different states.'"

It is worthy of note that Mr. Justice Field, who wrote the opinion of the Supreme Court in Paul *v.* Virginia, wrote a strong dissent in this case, largely based upon the former expressions of the court in Bank of Augusta *v.* Earle, and Paul *v.* Virginia.

In Security Mutual Life Insurance Company *v.* Prewitt, *supra*, an insurance company of New York had been admitted to the right to transact business in the state of Kentucky. The state exacted as one of the conditions imposed upon a foreign corporation doing business within its borders that it waive its right to remove cases arising in the state court to the federal court. The Supreme Court held that no question of interstate commerce being involved, the refusal of the State to permit the insurance company to continue to do business because of its removal of a case arising in the state court to the federal court was not in violation of the federal Constitution. In this case a strong dissenting opinion was filed by Mr. Justice Day, concurred in by Mr. Justice Harlan. The dissenting opinion very thoroughly reviewed and analyzed the prior decisions of the court upon the subject involved, and held that the right of the company to continue to do business in Ken-

tucky could not be made to depend upon the willingness of the company to surrender a right guaranteed to it under the federal Constitution, whether such company be engaged in interstate commerce or not.

V. The Latest Adjudications.

By the decisions of the Supreme Court in Western Union Telegraph Company *v.* Kansas, and the Pullman Company *v.* Kansas, no doubt further exists and no room for argument remains, with reference to the want of power in the states to regulate or interfere, directly or indirectly, with interstate commerce; whether such is undertaken by requiring foreign corporations engaged in interstate commerce to seek the assent or permission of the state to transact business therein, or by the exercise of the taxing power by the state, ostensibly to reach only intrastate business.

In Western Union Telegraph Company *v.* Kansas,[12] the court say:

"We repeat that the statutory requirement that the telegraph company shall, as a condition of its right to engage in local business in Kansas, first pay into the state school fund a given per cent of its authorized capital, representing all its business and property everywhere, is a burden on the company's interstate commerce, and its privilege to engage in that commerce, in that it makes both such commerce, as conducted by the company, and its property outside of the state, contribute to the support of the state's schools. Such is the necessary effect of the statute, and that result cannot be avoided or concealed by calling the exaction of such a per cent of its capital stock a 'fee' for the privilege of doing local business. To hold otherwise, is to allow form to control substance. It is easy to be seen that if every state should pass a statute similar to that enacted by Kansas, not only the freedom of interstate commerce would be destroyed, the decisions of this court nullified, and the business of the country thrown into confusion, but each state would continue to meet its own local expenses not only by exactions that directly burdened such commerce, but by taxation upon property situated beyond its limits. We cannot fail to recognize the intimate connection which, at this day, exists between the interstate business done by interstate companies and the local business which, for the convenience of the people, must be done, or can generally be better and more economically done, by such interstate companies rather than by domestic companies organ-

[12] 216 U. S. 1.

ized to conduct only local business. It is of the last importance that the freedom of interstate commerce shall not be trammeled or burdened by local regulations which, under the guise of regulating local affairs, really burden rights secured by the Constitution and laws of the United States. While the general right of the states to regulate their strictly domestic affairs is fundamental, in our constitutional system, and vital to the integrity and permanence of that system, that right must always be exerted in subordination to the granted or enumerated powers of the general government, and not in hostility to rights secured by the supreme law of the land."

And, again, at page 206:

"The right of the telegraph company to continue the transaction of local business in Kansas could not be made to depend upon its submission to a condition prescribed by that state, which was hostile both to the letter and spirit of the Constitution. The company was not bound, under any circumstances, to surrender its constitutional exemption from state taxation, direct or indirect, in respect of its interstate business and its property outside of the state, any more than it would have been bound to surrender any other right secured by the national Constitution."

In the case of Pullman Company *v.* Kansas,[13] the court say:

"We hold: 1. That the Pullman Company was not bound to obtain the permission of the state to transact interstate business within its limits, but could go into the state, for the purposes of that business, without liability to taxation there with respect to such business, although subject to reasonable local regulations for the safety, comfort, and convenience of the people which did not, in a real, substantial sense, burden or regulate its interstate business, nor subject its property interests outside of the state to taxation in Kansas. 2. That the requirement that the company, as a condition of its right to do intrastate business in Kansas, should, in the form of a fee, pay to the state a specified per cent of its authorized capital, was a violation of the Constitution of the United States, in that such a single fee, based as it was on all the property interests, and business of the company, within and out of the state, was, in effect, a tax both on the interstate business of that company, and on its property outside of Kansas, and compelled the company, in order that it might do local business in Kansas in connection with its interstate business, to waive its constitutional exemption from state taxation on its interstate

[13] 216 U. S. 56.

business and on its property outside of the state, and contribute from its capital to the support of the public schools of Kansas; that the state could no more exact such a waiver than it could prescribe as a condition of the company's right to do local business in Kansas that it agree to waive the constitutional guaranty of the equal protection of the laws, or the guaranty against being deprived of its property otherwise than by due process of law."

Mr. Justice Holmes dissented in Western Union Telegraph Company *v.* Kansas, *supra*, and in his dissenting opinion called attention to the effect of the decision upon the expressions of the court in the earlier cases in the following language:

"I am aware that the battle has raged with varying fortunes over this matter of unconstitutional conditions, but it appears to me ground for regret that the court so soon should abandon its latest decision, Security Mut. L. Ins. Co. *v.* Prewitt, 202 U. S. 246."

The whole question of the relative powers of the federal government and the states under the federal Constitution has received a renewed and exhaustive consideration. The court reviewed all its previous expressions, resulting in substantially overruling the broad doctrine laid down in the Bank of Augusta *v.* Earle, and Paul *v.* Virginia; and under the lead of Pensacola Telegraph Co. *v.* Western Union Telegraph Co., and the dissenting opinion in the case of Security Mutual Life Insurance Co. *v.* Prewitt, establishes the unquestioned supremacy of federal laws over state laws in any conflict between the law-making power of the states and the Union, upon any subject embraced within the federal Constitution. There is also established in these recent cases the rule that corporations engaged in interstate commerce, as well as individuals, are entitled to the equal protection of the laws and in a position to invoke the protection of the Fourteenth Amendment. This was held in Southern Railway Company *v.* Greene,[14] in the following language:

"We hold, therefore, that to tax the foreign corporation for carrying on business under the circumstances shown, by a different and much more onerous rule than is used in taxing domestic corporations for the same privilege, is a denial of the equal protection of the laws, and the plaintiff being in position to invoke the protection of the Fourteenth Amendment, that such attempted taxation under a statute of the state does violence to the federal Constitution."

[14] 216 U. S. 400–404.

VI. The Enumerated Powers of Congress.

There can be no doubt of the intention of the framers of the Constitution in seeking to vest Congress with a broad control and power of regulation over the people and the affairs of the nation.

In addition to the Commerce Clause, let me draw attention to the various other enumerated powers specifically vested in Congress by the Constitution, dealing with vital conditions and governmental functions:

The powers (1) to coin money, regulate the value thereof, and of foreign coin, and to fix the standard of weights and measures; (2) to establish post-offices and post roads; (3) to establish uniform laws on bankruptcy throughout the United States; (4) to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and the general welfare of the United States; (5) to borrow money on the credit of the United States, and (6), under the general powers, as decided by the Supreme Court of the United States in the case of McCulloch *v.* Maryland, to establish national banks.

Each of these enumerated powers is full and complete over the subject matter of the grant. Taken together, they constitute a strong, virile system of governmental regulation of the interstate and foreign commerce of the country. Within the comprehension of these powers, Congress can effectively regulate all the complex business relations of the people and promote the growth and development of the commerce of the nation.

Every citizen in every walk of life, whether he be farmer, merchant, manufacturer, artisan, or banker, has need to use some of the agencies or instrumentalities within the power of Congress to regulate, be it a railroad, or a steamship; the telegraph or the telephone; mails, or banks. That being so, no business of any moment can be conducted in this country by individuals, by partnerships or by corporations, except it partakes of the character of interstate commerce. The various instruments of commerce have brought the people so closely together, and the ramifications thereof have become so universal, that substantially all the business of the nation is interstate business, and the percentage of business done between citizens of the same state, namely, strictly intrastate business, is

relatively insignificant. This being so, powers of regulation involving the business of the country must, under the Constitution, necessarily be vested in Congress, and denied to the states.

The states cannot effectively provide for the enjoyment of the opportunities afforded by the instrumentalities of commerce. They have no right to legislate with reference thereto. If they undertook to do so, and Congress had acted or should act, the action of the states would instantly be nullified.

VII. Federal Incorporations.

The great development of the country in railroads and industrial enterprises and mercantile business generally, has made it impossible for any one person or collection of persons, from their own resources, to meet the financial requirements of such large undertakings. If the progress is to continue, the necessary capital must be found. This could not be secured from partnerships or individuals, but could only be effectively accomplished through the medium of corporations and the offer of their securities for public investment.

The utility, nay, the very necessity, of corporate form in business enterprises of this character can no longer be denied. Nor can it be denied that in their employment abuses have arisen which demand remedies at the hands of the law-making power. The existing tendency towards amalgamation has resulted in the formation of large corporations whose fields of operation are not limited by state or national lines, and which in every sense must be regarded, not as local, but as national enterprises. The states are powerless to deal effectively with these vast interests.

That being so, corporations must as nearly as possible be within the regulatory powers of Congress, both for their own protection and for the protection of the people. In order to give corporations their proper status in the nation, so as to enable them to continue to develop the commerce and resources of the country, as well as to secure the people and their property against corporate abuses, corporations engaged in interstate commerce should become *citizens of the United States*. As the law now is, great confusion exists. Corporations organized under the laws of one state are denied certain privileges under the laws of other states, and are

subject to obligations from which they are exempt in their own state. The investments of the people in such corporations are subject to vicissitudes and to the fluctuating legislation of the various states. To permit such conditions to continue means chaos, and an endless confusion of rights and obligations, without effective opportunity to vindicate such rights or redress the wrongs.

Is there not a remedy for these conditions? Is it possible that this great nation, possessing the broad powers vested by the Constitution, which together constitute an effective system of governmental regulation, should be unable to meet and cope with this situation? The answer is self-evident.

In the case of Paul *v.* Virginia, *supra*, the Supreme Court held that foreign corporations are not entitled to those privileges and immunities which are given to the citizens of the several states, but that the rights of foreign corporations, that is, corporations organized under the laws of one state undertaking to exercise their powers in a different state, can only be exercised as a matter of comity and not as a matter of right.

The recent decisions of the Supreme Court above set forth fully establish the law in respect to corporations engaged in interstate commerce and assure to them the full protection of all federal guarantees wherever their business is carried on, as also their freedom from state regulation seeking to curtail these rights.

In the case of Southern Railway Company *v.* Greene, *supra*, the Supreme Court has now fully established the doctrine that a corporation is a person within the meaning of the Fourteenth Amendment.

Corporations should also have the benefit of the constitutional guarantees contained in section 2 of Art. IV of the Constitution, namely:

"The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens of the several States."

Of course this does not involve such privileges as the right of suffrage, but does embrace every property right in which any individual is protected.

Corporations have been held to be persons within the meaning of the Fourteenth Amendment, but not citizens of the United States. Corporations should be permitted to enjoy, so far as their property

or property rights are concerned, the same protection as citizens as is given to natural persons.

This, I am confident, can be accomplished by the organization of corporations engaged in interstate commerce under the direct authority of Congress. Under such a law, these corporations would be subject to all the conditions and regulations therein imposed. And, too, it cannot be successfully claimed that such legislation would be subject to any constitutional objection. A corporation engaged in interstate commerce is a means by which interstate or foreign commerce is conducted, and would be as much within the protection of the Commerce Clause as a railroad, which is a mere artery of commerce. No doubt is now entertained that railroads are mere instruments of interstate commerce, and subject to regulation as such; and other corporations engaging in interstate commerce would be held to be like agencies, and subject to like regulation. Corporations organized under federal authority would have many advantages in the management and conduct of their corporate affairs, which are not obtainable under state organization.

Mr. Attorney-General Wickersham, who, I understand, is sponsor for the Federal Incorporation Act introduced at the last session of Congress, said upon this subject in an article appearing in the Yale Law Journal:

> "Such corporations formed under national law would not be foreign corporations in any of the states, and would therefore be at liberty to transact their business without state permission and free from state interference. If, now, Congress shall enact a law providing for national incorporation to carry on interstate commerce, subject to such restrictions and with such freedom from local state control as Congress shall see fit to prescribe, state control of foreign corporations in all probability will soon cease to be a subject of great importance."

It is my judgment that we can safely go one step further than did the Attorney-General. I believe that a corporation organized under federal law may become a *citizen of the United States*, and as such will be *eo instanti* entitled to the protection and benefits and the immunities and privileges guaranteed by the Constitution to the citizens of each state, in so far as its rights and duties and obligations appertain to its property or property rights.

In this respect we have an expression of the Supreme Court in the case of Pensacola Telegraph Co. *v.* Western Union Telegraph Co.,[15] where the court, in speaking of the case of Paul *v.* Virginia, *supra*, directed attention to this thought in the following language:

"We are aware that in Paul *v.* Virginia, 8 Wall. 168 (75 U. S., XIX, 357), this court decided that a state might exclude a corporation of another state from its jurisdiction, and that corporations are not within the clause of the Constitution which declares that 'The citizens of each state shall be entitled to all privileges and immunities of citizens of the several states.' (Art. IV, sec. 2.) That was not, however, the case of a corporation engaged in interstate commerce, and enough was said by the court to show that, if it had been, very different questions would have been presented."

In the case of Pullman Co. *v.* Kansas, *supra*, Mr. Justice White, in a separate concurring opinion, calls attention to an expression of the Supreme Court in Horn Silver Mining Company *v.* New York,[16] where it is announced that a limitation on the power of the state to interfere with the right of a foreign corporation to do business in another state does not apply where such corporation is in the employ of the general government. This exception, as Mr. Justice White says, was first stated by the late Mr. Justice Bradley in Stockton *v.* Baltimore & N. Y. R. Co.[17] In that case, the state of New Jersey, acting through its attorney-general, sought to prevent the Staten Island Rapid Transit Company, a New York corporation, and the Baltimore & N. Y. R. Co., a New Jersey corporation, from constructing or maintaining a railroad bridge across Staten Island Sound, on the ground that the assent of the state of New Jersey had not been secured, and that the state of New Jersey was the owner of the shore and land under water.

Incidentally, the question was raised as to the right of the Staten Island Rapid Transit Company to perform any acts or transact any business as a corporation in New Jersey, it not having qualified in that state as a foreign corporation. In that regard Mr. Justice Bradley says:

"The habits of business have so changed since the decision in the case of Bank of Augusta *v.* Earle, 13 Pet. 519, and corporate organizations

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[15] 96 U. S. 1. [16] 143 U. S. 305. [17] 32 Fed. 9, 14.

have been found so convenient, especially as avoiding a dissolution at every change of membership, that a large part of the business of the country has come to be transacted by their instrumentality; while their most objectionable feature, the non-liability of corporators, has in most instances been abrogated in whole or in part; and to deny their admission from one state to another in ordinary cases, at the the present day, would go far to neutralize that provision in the Fourth Article of the Constitution which secures to the citizens of one state all the privileges and immunities of citizens in another, and that provision of the Fourteenth Amendment which secures to all persons the equal protection of the laws. . . .

"It is undoubtedly just and proper that foreign corporations should be subject to the legitimate police regulations of the state, and should have, if required, an agent in the state to accept service of process when sued for acts done or contracts made therein. In reference to some branches of business, like those of banking and insurance, which affect the people at large, they may also be subject to more stringent regulations for the security of the public, and may be even prohibited from pursuing them except upon such terms and conditions, not unlawful in themselves, as the state chooses to impose. But in the pursuit of business authorized by the government of the United States, and under its protection, the corporations of other states cannot be prohibited or obstructed by any state. If Congress should employ a corporation of ship builders to construct a man-of-war, they would have the right to purchase the necessary timber and iron in any state of the Union. And, in carrying on foreign and interstate commerce, corporations, equally with individuals, are within the protection of the commercial power of Congress, and cannot be molested in another state by state burdens or impediments."

Again, Mr. Justice Bradley, in the course of that decision, says:

"In our judgment, if Congress itself has the power to construct a bridge across a navigable stream for the furtherance of commerce among the states, it may authorize the same to be done by agents, whether individuals, or a corporation created by itself, or a state corporation already existing and concerned in the enterprise."

The Supreme Court in the Horn Silver Mining case, in commenting on Mr. Justice Bradley's decision, said:

"If Congress should employ a corporation of ship builders to construct a man-of-war, they would have the right to purchase the necessary timber and iron in any state of the Union."

And the court, in citing this paragraph, added:

"without the permission and against the prohibition of the state. Mining Co. *v.* Pennsylvania, 125 U. S. 181, 186."

Corporations serving the government under authority of Congress are analogous to the case of a corporation doing interstate commerce business under direct authority of Congress, namely, by reason of incorporation under federal law. If a state corporation can, as is said by the Supreme Court, serve the government under authority of Congress in any state of the Union "without permission and against the prohibition of the state," any corporation organized under national law for the purpose of carrying on interstate commerce can be given and hence will have every protection and every privilege for that purpose accorded to any individual citizen of any state, and whatever business is done within the confines of a state by any such corporation organized under national law, will be regarded as an incident to its general business and its general power to conduct interstate commerce, and Congress will have and will exert its power to protect its own instrumentality of commerce from state interference.

And no state, because of the fact that a part of the business of such a corporation is conducted within the borders of that state, will be permitted to burden the interstate commerce of that corporation, and any effort in that direction will be regarded as in violation of the constitutional rights of such corporation. This is fully established beyond all question by the Western Union case decided at the last term by the Supreme Court.

Congress by authorizing the organization of a corporation to conduct interstate commerce is acting within the powers committed to it by the Constitution, and its enactments in that regard will be the "supreme Law of the Land," and corporations acting thereunder will receive the fullest protection of the constitutional guaranties.

But in the advocacy of corporations and corporate ownership, we must never lose sight of the other side, which demands such supervision over the organization and management of corporations as is requisite to protect the investor who makes the corporation possible; protect the people who are interested therein or affected thereby, as well as protect the public interest.

VIII. Publicity in Corporate Business.

One of the great forms of protection flowing from the organization of corporations under federal law, will be the power of Congress to provide, for the benefit of the public, the means of ascertaining the condition of every corporation at the time of its organization and of its management and operations. I am one of those who believe that the fullest corporate publicity is not only right, but should be enforced.

The late Mr. Justice Brewer said:

"Publicity has a tendency to prevent schemes and keen transactions in corporate life. Publicity is not a new force in our national life, but its power is greater to-day than in the past. Publicity helps to form public opinion as the mighty force of the age."

Every corporation should be in duty bound to make reports to the stockholders at regular intervals. These reports should be given the fullest publicity, and should disclose with completeness all facts concerning its organization; its securities issued or to be issued, and the consideration therefor; its property, and its value; its earnings, and its operations generally. No corporation honestly organized and managed would object to making and publishing such reports. There can be no question that in the end full publicity of corporate organization and management will solve all questions of inflations in corporate securities and misrepresentations in the marketing thereof.

The investor should be enabled to determine for himself the advisability of investing in securities offered.

When corporations can be organized, as is the practice in this country, in a wholly perfunctory manner, without inquiry or investigation either as to the character or stability of the individuals interested, or as to the value of the securities to be issued, a duty, I think, rests upon the government to protect its citizens by requiring full reports to be made and published. The government cannot, of course, make itself the guardian of the investor's judgment, but it can discharge what seems a plain duty towards all citizens, by requiring all corporations to publish reports and statements of their affairs, so that investors may advise themselves with respect thereto; and, that done, I think it may fairly be said

the government has discharged its duty, and the responsibility thereafter will rest with the investor. If he is indifferent to the opportunities offered, or errs in the exercise of his judgment, the loss that he may suffer will be his misfortune.

It may be said that corporations seeking to avoid publicity will not avail themselves of any act of Congress providing for incorporation. That may be so for a time. Ultimately, as the advantages to corporations organized under national law become apparent, and when, too, crystallized public opinion will make it necessary for any reputable business corporation to make full publicity, the opportunity for incorporating under national law will be generally availed of.

Fortunately, Congress is not powerless to enforce corporate publicity, because, forsooth, those corporations seeking to avoid their reasonable obligation in that regard will not incorporate under national law. There are two well-recognized methods which can be availed of by Congress to secure compliance by corporations with the plain duty of publishing all the facts appertaining to its organization, its management, and its affairs.

Congress, by regulating the use of the mails and channels of interstate commerce, may compel every corporation engaged in any business, *whether interstate or not*, to give publicity to its corporate affairs, by legislation denying the use of the mails and the instruments of interstate commerce for the transmission of any matter concerning the affairs or business of any corporation that fails to make and file reports of the fullest nature concerning its organization and business, such, for example, as are already exacted from the interstate carriers under the Interstate Commerce Act. Such legislation would be valid and enforceable. The mails are an instrumentality organized and conducted by the national government for the benefit and convenience of the people. It is an agency over which the government has absolute and unqualified control, free from restraints or restrictions of any kind save those found in the Constitution. The government has the right to determine for itself what may be carried in the mails and what should be excluded therefrom.

The Supreme Court of the United States, through Chief Justice Fuller, in the case of *Ex parte* Rapier,[18] say in this respect:

[18] 143 U. S. 110.

"The states, before the Union was formed, could establish post-offices and post-roads, and in doing so could bring into play the police power in the protection of their citizens from the use of the means so provided for purposes supposed to exert a demoralizing influence upon the people. When the power to establish post-offices and post-roads was surrendered to the Congress, it was as a complete power; and the grant carried with it the right to exercise all the powers which made that power effective. It is not necessary that Congress should have the power to deal with crime or immorality within the states in order to maintain that it possesses the power to forbid the use of the mails in aid of the perpetration of crime or immorality."

Under the authority of this case, it appears Congress has absolute power over the mails and can regulate the use thereof as it chooses; that it has the right to say that no mail matter of any kind, whether emanating from the corporation or from any individual, should be carried unless the corporation concerned in such mail matter has made the required reports.

Just as effectively can Congress act through the regulation of the interstate commerce agencies, by prohibiting the use of express companies or carriers in transporting any matter relating to the business or affairs of a corporation failing to make such reports. This is an effective and practical method of enforcing publicity. Corporations could not interchange communications with their stockholders or transact any of their business through the mails or through the means of interstate commerce, unless they complied with such laws. Bankers could not offer for sale the securities of non-complying corporations, nor could such corporations' securities be transmitted either in the mails or through the agencies of interstate commerce, without violating such laws. Under these conditions every corporation engaged in business, whether interstate or not, would comply with the laws of Congress in that respect, and the desired and necessary publicity would be effected.

There is another power vested in Congress which for purposes of regulation is perhaps even more potent than that possessed by it through its control over interstate commerce and the mails. I refer to the power to lay and collect excise taxes. If the doctrine laid down in the case of McCray *v.* United States [19] is adhered to, the extent of that power for purposes of regulation is almost boundless.

[19] 195 U. S. 27.

In that case, the Supreme Court of the United States construed an act which levied a prohibitive tax upon colored butterine. The tax was ostensibly levied for the purpose of raising revenue, but its necessary effect was to render the manufacture and sale of colored butterine a commercial impossibility. The validity of the tax was attacked upon the ground that its evident purpose was not to raise revenue but to exercise a power not conferred by the Constitution in prohibiting the manufacture and sale of colored butterine.

The Supreme Court, in passing upon the validity of the act, held that it was not competent for the court to inquire into the purposes of Congress in passing the act; that Congress possessed power to classify subjects of taxation; that such classification could not be inquired into, and that even if such inquiry were permissible, the fact that colored butterine tended to deceive the public was a sufficient justification for levying upon it a higher rate of tax than that imposed upon uncolored butterine, which did not possess the same tendency to deceive.

By applying the practice pursued by Congress in McCray *v.* United States, *supra* (Oleomargarine case), we have another method of dealing with the matter of publicity.

The taxing power of the government is absolute and efficacious, and with reference to the kind of publicity here suggested, legislation could be enacted which would impose an excise tax upon the securities of any corporation which did not furnish to its stockholders and the public the requisite publicity.

As late as April 4, 1910, the Supreme Court of the United States, in the case of International Text-Book Company *v.* Pigg, reaffirmed the doctrine announced in the case of Crutcher *v.* Kentucky,[20] as follows:

"Congress would undoubtedly have the right to exact from associations of that kind [corporations engaged in interstate commerce] any guaranties it might deem necessary for the public security, and for the faithful transaction of business; and as it is within the province of Congress, it is to be presumed that Congress has done or will do all that is necessary and proper in that regard."

One of the recognized methods of regulation, therefore, is the exercise of the taxing power of Congress. Indeed this method of

[20] 141 U. S. 47.

regulation was exercised by Congress at the last session, in the enactments taxing corporations upon their income. The validity of this legislation is now before the Supreme Court in the so-called Corporation Tax Cases.

Mr. Justice Story, in his great work upon the Constitution, in speaking of the taxing power with reference to its use as a means of regulation, says, on page 687:

"Now, nothing is more clear, from the history of commercial nations, than the fact that the taxing power is often, very often, applied for other purposes than revenue. It is often applied as a regulation of commerce."

Legislation to limit or to exercise supervision over the issues of securities by corporations engaged in interstate commerce, particularly such as are not charged with a public interest, might, perhaps, become unnecessary or at any rate less important if full and complete publicity of the organization and affairs of such corporations would be provided for and enforced.

Conclusion.

The two vital differences between the Articles of Confederation and the Constitution have become clearer and more distinct as time has passed and the country has progressed. Each deals with the relative powers of the federal government and the states. These differences are the absence from the Articles of Confederation of any delegation of power by the states to Congress, to regulate commerce and the establishment by the Constitution of more perfect union among the people of the United States, instead of a league of friendship among the respective states.

The Constitution in its Preamble signalized the purpose thereof to be the establishment of a union of the people for all such purposes as affected or involved them as a nation.

It must be clear that as to all matters affecting the country and the people as a whole, there should be concentration of authority and uniformity of laws; there should be union of thought and union of action, for division of power and division of responsibility are subversive of strength and endurance. The general pursuits of the nation and its people require regulation within all its four corners;

for all pursuits, whether manufacture, mining, agriculture, commerce, transportation or finance, are so intertwined and interwoven as to require the people of each of the states to deal with the people of all the states. The power of regulation must not be divided, but should be united, in order to establish laws and regulations which make for the benefit of all the people, instead of regulations and laws made by the several states merely in the interests of their own citizens. The constitutional purpose "to form a more perfect Union" is best subserved when the law-making power which affects the interests and the well-being of all the people of all the states is centralized in a legislative body in which are represented the people from every section, whose different interests and varying thoughts may be brought to bear, in establishing and enacting such legislation as will best serve the common interest of a common country. That being so, the powers of regulation should rest with the national Congress, and that is where the wisdom of our forefathers placed them.

The federal government, acting through Congress, is the only power able to deal adequately with questions of universal interest to all the people. It is necessary to have one source of control, directly responsible to all the people of the nation, and to have simplicity, to avoid the complexities and embarrassments of conflicting State laws, no two of which are alike. A state hears only the interests of its own people in enacting its legislation. Congress is over all, of all, and for all the people. With laws in this form, amendments will be easy of accomplishment when needed, and wise policies given effect promptly, since application will be made to one law-making body instead of to many. With the powers of regulation vested in Congress, union of effort and concentration of authority, as well as uniformity of laws and uniformity of enforcement, are reasonably assured.

What is here contended for is not an enlargement upon the powers of Congress, but is merely in suggestion of remedies which can be availed of under the constitutional powers of Congress as they exist to-day, and which have not heretofore been fully exercised. At no time in our history have conditions so much required such action as now, and never were such laws more necessary in the interests of the well-being of the people and the future of the country.

States have repeatedly undertaken to exercise powers of regulation, each in its own selfish way, more or less intrenching upon the powers vested in Congress, and invariably have their enactments been condemned as unconstitutional. Such sporadic efforts, constantly failing, are subversive of good government and stimulate and require action by Congress through the powers conferred by the Constitution, fully established by that tribunal, whose edict is final and conclusive, and always wins the respect and compliance of the nation.

Max Pam.

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